OREGON NATURAL RESOURCES COUNCIL

IBLA 88-25 Decided April 19, 1990

Appeal from a decision of the Burns District Manager approving the construction of two wildlife guzzlers within the boundaries of a wilderness study area. EA OR-020-5-34.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness

Construction of two guzzlers within a wilderness study area will be affirmed where the record establishes that the purpose of the guzzlers is to increase available water for wildlife and that the construction of the guzzlers will not impair the area's suitability for inclusion in the permanent wilderness system.

APPEARANCES: Don Tryon, Bend, Oregon, for appellant; Tom Harris for Pacific Northwest Four Wheel Drive Association, Inc.; Donald P. Lawton, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Oregon Natural Resources Council (ONRC) has appealed from a decision of the Burns Oregon District Manager, Bureau of Land Management (BLM), dated August 10, 1987, denying its protest and approving the construction of two wildlife guzzlers within the boundaries of the Rincon Wilderness Study Area (WSA), Burns District, Oregon.

On March 19, 1985, the Burns District Office transmitted to appellant a list of certain projects in WSA's planned for implementation in 1985. Included in this list was the construction of a wildlife guzzler (i.e., water catchment) in the Rincon WSA. Appellant was advised in the accompanying transmittal letter that it would receive a copy of the environmental assessment (EA) prepared for each project or group of projects listed. A draft EA which proposed the construction of two guzzlers (Beatty's View and Square Mountain) on the Catlow Rim within the Rincon WSA was thereafter transmitted. The stated justification for construction of these two guzzlers was to increase water available for wildlife in the area, particularly for Californian bighorn sheep. Fencing around the

guzzlers was planned in order to exclude cattle from the newly developed water sources.

By letter dated September 22, 1985, appellant questioned, inter alia, the need for the proposed guzzlers within the Rincon WSA. Thus, appellant asked:

> If 30-50 bighorn sheep used the portion of Catlow Rim referred to in the EA prior to recorded history, why can only 15 animals survive there now? Why are guzzlers needed to restore natural population numbers? [1/]
>
> There isn't any doubt that sensitive areas need protection from livestock abuses. However, the proposals to fence spring and meadow areas are band-aid approaches to a complex problem. We aren't satisfied protecting a few acres of the WSA while the rest of the unit continues to be overgrazed.

On November 26, 1985, EA OR-020-5-34 was approved along with a finding of no significant impact (FONSI) and the decision was made to proceed with construction of the two guzzlers. In describing the environmental conse-quences of the proposed action, the final EA noted that:

> Development of these two water sources should improve habitat greatly along Catlow Rim since no summer water is known south of Shipley Spring for at least ten miles. Jim Lemos, Wildlife Biologist, Oregon Department of Fish and Wildlife, estimates the present big game population densities of the area as 1 deer/mile^2 and 3 pronghorns/mile^2 would increase to 3 deer/mile^2 and 6 pronghorns/mile^2 due to the proposed action. Presently 11 bighorns are using the area. He estimates the potential bighorn herd size to be 30 bighorns with the proposed action. He believes the area could have supported a herd of 30 to 50 bighorns prior to the arrival of white man with his grazing animals. Overgrazing by wildlife is unlikely to occur due to the proposed action. More than 20 guzzlers occur on public lands in the Burns District and no overgrazing due to excessive numbers of wildlife has been observed at any site.

(Final EA at 5). The FONSI noted that "[t]he design features and mitiga-tion measures identified in the attached EA would assure that NO signifi-cant adverse impacts would occur to the human environment. Only minor impacts to wilderness values and other resource uses were identified. Wilderness and wildlife habitat quality would be enhanced by the proposal."

1/ Paradoxically, while these figures are provided in the final EA, they were not contained in the draft EA, at least not in the copy included in the case file.

On December 30, 1985, appellant filed a protest challenging the action proposed in the EA and reiterating its question as to why the area would only support 15 bighorn sheep without the addition of the guzzlers. 2/ Appellant's protest concluded by indicating that ONRC might be amenable to further discussions on the issues raised therein. Accordingly, on March 5, 1986, prior to rendering a formal decision on appellant's protest, the District Manager responded in writing to each item raised in this and other ONRC protests. 3/ A subsequent meeting and joint field examination of the proposed projects were held in an effort to resolve appellant's concerns. With respect to the proposed wildlife guzzlers, however, this effort proved unsuccessful.

By letter dated June 15, 1986, appellant reconfirmed its protest of the guzzlers, noting that it was appellant's understanding that the Oregon Department of Fish and Wildlife (ODFW) would be asking BLM to discontinue consideration of the projects "pending further research and better under-standing of the needs of Sheep generally and specifically." Appellant asked to be kept informed of developments.

Contrary to appellant's expectations, however, by letter dated January 30, 1987, ODFW informed BLM that it supported the Square Mountain guzzler. Thereafter, by letter dated July 6, 1987, ODFW notified BLM that, with respect to the Beatty's View guzzler, it was ODFW's intent to first install the Square Mountain guzzler and closely monitor wildlife utiliza-tion. Depending on wildlife acceptance, ODFW intended to install the Beatty's View guzzler 2 to 3 years later. 4/

2/ Appellant also objected to the tiering of the FONSI to the Burns District Bighorn Sheep Habitat Management Plan, when that plan had not been made available to the public. In a memorandum to the State Director, dated Jan. 21, 1986, the Burns District Manager explained that the plan was still subject to review and amendment, at which time appellant could make any relevant comments, and accordingly District officials did not believe it was necessary to solicit comments at the time that the plan was initially prepared, though the District Manager conceded that they could have included those portions of the plan relevant to the EA. A copy of the management plan was ultimately sent to appellant.

In the Board's view, the efficacy of tiering is entirely undermined if the documents being tiered have not, themselves, been made available for public review and comment. While this issue is not dispositive of the instant appeal, care should be taken in the future to assure that suppor-tive documents being referenced in EA's have themselves been made accessible to public scrutiny.

3/ ONRC had filed an earlier protest on Dec. 5, 1985, pertaining to an EA and related decision concerning the Lone Mountain Wildlife Fences (EA-OR-020-5-40). An agreement was ultimately reached with respect to this protest.

4/ While Federal approval of the installation of the guzzlers was required since the land was Federally owned, the EA had noted that the actual development of the sites would be a joint action by BLM, ODFW, and volunteers. See EA at 1.

As noted above, by decision dated August 10, 1987, appellant's protest was formally denied. This decision expressly referenced ODFW's support for the project noting BLM's view that the "information provided by ODFW fully answers the points of protest made in your letter of June 15, 1986" (Decision at 2). The instant appeal followed.

On appeal, ONRC challenges both the specific actions proposed by the EA as well as BLM's general management of the Rincon WSA in light of its obligations under section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1982). In particular, appellant argues that "[i]ntroducing water to a naturally dry environment to enlarge popula-tions of deer, chukar, antelope and numerous non-game species is contrary to the concept of wilderness" (Statement of Reasons (SOR) at 6). Appellant continues:

> The real question is whether bighorn sheep need to have a naturally dry environment altered for them because direct competition with livestock and habitat degradation from livestock have only left them a postage stamp portion of their native range. * * *
>
> The appropriate approach, and the "minimum tool" approach to protecting wildlife values is to recognize that in order to afford environmental protection the grazing program needs alteration. The grazing program, native rangeland resources and wild-life program will benefit. Appropriate timing of grazing practices will allow bighorn sheep a broader range and access to some water resources now dominated by livestock.

Id. 5/

It seems reasonably apparent that two discrete, albeit interrelated, concerns animate ONRC's appeal. The first is the extent to which grazing use of the subject area has diminished natural water supply for wildlife necessitating the development of artificial sources in order to compensate for diminished natural supply. The second is the extent to which artificial improvements, even when designed to benefit wildlife, may be constructed within WSA's. In the Board's view, while it does not deprecate appellant's concerns, the impact of grazing use is not properly raised in the confines of the present appeal.

It is undisputed that the purpose of the two guzzlers is solely to provide a water source for wildlife. Indeed, the fencing around the guzzlers is designed to prevent cattle from using the developed waters. Thus, nothing in the decision under appeal can be said to benefit the grazing of cattle. In any event, to the extent that appellant wishes to

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5/ Appellant also criticized ODFW's actions, contending that it "has long been a proponent of guzzlers." This criticism is, of course, inconsistent with appellant's earlier reliance on what it assumed was ODFW's opposition to the construction of the guzzlers. See Letter of June 15, 1986.

question the nature and extent of continued grazing in the area, such a challenge should be made directly to the grazing program. 6/

On the other hand, the extent to which BLM may authorize the construction of wildlife guzzlers within a WSA is properly before the Board. Resolution of this question requires an analysis of the Department's authority and responsibilities under section 603 of FLPMA, 43 U.S.C. § 1782 (1982).

[1] As this Board has noted in the past with reference to management of WSA's pending review of their suitability for inclusion in the permanent wilderness system, the guidelines established by the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) 7/ are binding on all BLM State Offices. See generally The Wilderness Society, 106 IBLA 46 (1988); L. C. Artman, 98 IBLA 164 (1987). No variance therefrom may be authorized absent an express justification in the record for such action. See The Wilderness Society, supra at 55.

As noted in the IMP, the starting point for analysis of the permissibility of actions proposed to be undertaken in a WSA rests in the mandate of section 603(c) of FLPMA that the Secretary manage such lands so as to not impair their suitability for inclusion in the wilderness system. With the exception of grandfathered uses, any discretonary action which impairs such suitability is forbidden. Since there is no question that the proposed construction of the wildlife guzzlers does not fall within a grandfathered use, a determination that their construction would impair the suitability of the Rincon WSA for inclusion in the wilderness system would necessarily compel the conclusion that their construction must be prohibited.

But, even when the specific activity may be deemed nonimpairing (i.e., the activity would not impair the suitability of the area for inclusion in the wilderness system), its permissibility must still be established by

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6/ Moreover, we note that section 603(c) of FLPMA expressly provides that during the period of review of WSA's the Secretary shall continue to manage such areas so as not to impair the suitability of such areas for preser-vation as wilderness "subject, however, to the continuation of existing mining and grazing uses * * * in the same manner and degree in which the same was being conducted on October 21, 1976 * * *." 43 U.S.C. § 1782(c) (1982). Thus, to the extent that grazing uses pre-exist the adoption of FLPMA, their continuation in the same manner and degree is expressly authorized even if they result in impairment of wilderness characteristics, but the uses may be regulated to prevent any unnecessary and undue degradation of the lands involved. See Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979); Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981); H-8550-1 at 4.

7/ The IMP was originally published at 44 FR 72014 (Dec. 12, 1979) and was thereafter amended at 48 FR 31854 (July 12, 1983). A Handbook for BLM was subsequently issued to make the IMP a part of the BLM's directive manage-ment system. See H-8550-1. Citations in the text will be to both the IMP section and the Handbook page.

reference to the IMP. 8/ In this regard we note that the IMP contains specific guidelines for activities designed to affect wildlife within a WSA:

> Certain permanent installations may be permitted to maintain or improve conditions for wildlife and fish, if the benefitting species enhance wilderness values. Enhancing wilderness values means that a natural distribution, number, and interaction of indigenous species will be sought; natural processes will be allowed to occur as much as possible, and wildlife species should be allowed to maintain a natural balance with their habitat and with each other. Installations to protect sources of water on which native wildlife depend, such as exclosures, may be built for permanent use if they are substantially unnoticeable in the area as a whole and blend into the natural setting. Springs, wells, and guzzlers may be maintained, and new ones may be installed if they are substantially unnoticeable in the area as a whole and would not require maintenance involving motor vehicles if the area were designated as wilderness. (However, motor vehicles may be used to install and maintain these facilities while the area is under wilderness review, as is discussed below). [9/] Construction activities must satisfy the nonimpairment criteria.

(IMP at III.E., H-8550-1 at 41).

An examination of the EA clearly shows that the action undertaken was analyzed in light of the above provisions of the IMP. Thus, the EA, after first paraphrasing the IMP guidelines, noted that:

> The added sources of water provided by the proposed guzzlers would help to increase the natural distribution of [bighorn] sheep within the region and aid in returning their numbers in this specific location to near the anticipated historical level of 30 to 50 sheep. * * *
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> The installation of these developments would therefore ultimately result in the correction of a situation which was caused by man's presence, the elimination of bighorn sheep

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8/ As an example, introduction of exotic aquatic species to areas in which they had not previously been introduced would be prohibited by the IMP (see IMP at III.E., H-8550-1 at 40) even though such action would have no effect on the suitability of such lands for inclusion in the permanent wilderness system.

9/ This section of the IMP further provided that "[m]otor vehicles may also be used cross-country to build or maintain structures and installations authorized under the above guidelines, and temporary access routes may be built for this purpose as long as they satisfy the nonimpairment guidelines." Id.

> from their native range. In turn, they would also help return the area to a state which more closely approximates its original condition with respect to the presence of native wildlife popu-lations. Both these occurrences would result in an enhancement of the area's wilderness values.

(EA at 7). Moreover, specific mention was made of the fact that vehicles would not be needed for maintenance of the guzzlers, and that construction activities would not impair the area's suitability for wilderness preservation. Id. at 7-8. Ultimately, appellant's objection goes not to whether the action of the Burns District Manager conformed to the IMP but rather to whether the breadth of actions allowable under the IMP comport with the requirements of section 603(c) of FLPMA.

Thus, appellant notes that placement of artificial watering structures within wilderness areas, even for purposes such as increasing available water for wildlife, represents a form of habitat manipulation which should be eschewed in areas which have been purposefully set aside to be preserved in their untrammeled natural state. If an area is arid and cannot, without human interference, support a certain level of animal life, ONRC would argue that the attempted establishment of that numerical level should, itself, be abandoned, particularly where there is no evidence that the habitat is critical to species survival (SOR at 6).

While we recognize a certain intrinsic validity to the thrust of appellant's argument, it is, in a critical way, misplaced. If the actions being proposed were to occur within a wilderness area, it would be open to question whether the proposed actions could be deemed consistent with the regulatory mandate expressed in 43 CFR 8560.0-6. 10/ But the simple fact of the matter is that the actions being proposed will occur not in wilderness areas but in WSA's. With respect to such areas, the Secretary is not charged with maintaining the existing wilderness character of every parcel. Rather, he is expressly directed to:

> [M]anage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject,

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10/ Contrary to appellant's assumptions (SOR at 4), these regulations are not applicable to WSA's. By their own terms, they apply only to "public land designated by Congress as part of the National Wilderness Preservation System and administered under the provisions of the Wilderness Act of 1964." 43 CFR 8560.0-1. WSA's have not been designated by Congress to be part of the National Wilderness Preservation System and are administered not under the provisions of the Wilderness Act but, rather, under the provisions of section 603 of FLPMA, until such time as they may be so desig-nated. Indeed, section 603 of FLPMA expressly provides that "once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas." 43 U.S.C. § 1782(c) (1982).

> however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (1982). See generally California Wilderness Coalition, 101 IBLA 18, 25 (1988). To accomplish these goals, BLM promulgated the IMP to provide guidance to its employees in the management of these areas pending ultimate congressional determination on the inclusion of such areas in the permanent wilderness system.

Consistent with the mandate of section 603 of FLPMA, these guidelines are, in fact, weighted toward providing environmental protection. But while these guidelines absolutely prohibit BLM from using its discretionary authority so as to permit any action which might impair an area's suitability for inclusion in the wilderness system (see Eugene Mueller, 103 IBLA 308, 310 (1988)), it does not, as appellant might wish it, bar actions which merely result in or require human manipulation of the natural environment. On the contrary, the IMP expressly authorizes actions which result in permanent alteration of the existing environment "to maintain or improve conditions for wildlife or fish, if the benefitting species enhance wilderness values" (IMP at III.E., H-8550-1 at 41). This, indeed, is clearly the animating rationale behind the decision to place wildlife guzzlers at the two sites in question.

Appellant may disagree with this rationale, preferring to maintain such areas in their present state, even if this effectively prevents an increase in the size of the bighorn sheep population. 11/ This is certainly a valid choice. But the responsibility for managing such areas is vested in the Secretary and his delegate, BLM. BLM's decision to seek to increase the water supply available for wildlife and thereby increase the bighorn sheep population is an equally valid policy determination and one which is in full accord with both the IMP and section 603 of FLPMA. So long as BLM's management decision is based on consideration of all relevant factors and is supported by the record, the Board will not disturb it, absent a showing of a clear justification for modification or reversal. See California Wilderness Coalition, supra at 29; Wilderness Society, 90 IBLA 221, 232 (1986); Oregon Shores Conservation Coalition, 83 IBLA 1, 5 (1984); Curtin Mitchell & Stand, 82 IBLA 275, 277-78 (1984).

In assessing whether the presence of increased number of bighorn sheep will add to the wilderness characteristics of the area, BLM necessarily

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11/ We would note that even appellant does not hold to its opposition to man-made intrusions within WSA's with unwavering fidelity. Thus, appellant clearly would support the guzzlers if maintenance of the artificial watering system were necessary to species survival. See SOR at 6-7.

made subjective judgments which are entitled to considerable deference notwithstanding the fact that the result might be one over which reasonable individuals could differ. When challenged on appeal, such judgments may not be overcome simply by expressions of disagreement absent a showing of clear error of law or demonstrable error of fact. Utah Wilderness Association, 86 IBLA 89 (1985); Committee for Idaho's High Desert, 85 IBLA 112 (1985). Appellant has shown that other courses of action could be justified on the record before the Board. It has failed to establish, however, that the action which BLM elected to adopt is unjustified or contrary to the relevant statutes and policy guidelines.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Burns District Manager is affirmed.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge